89-181

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

EUGENIA RODRIGUEZ, Individually and As Next Friend of Alberto Torres,

Petitioner

v.

[redacted]

CITY OF BROWNSVILLE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the Court of Appeals erred in failing to hold that, under *City of Canton v. Harris*, —— U.S. ——, 104 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the need to train police officers in dealing with distraught, armed individuals is so obvious that failure to do so could properly be characterized as deliberate indifferences to constitutional rights.

2) Whether a policy of inadequate police training may be inferred from the conduct of several officers during a single incident absent evidence of prior similar incidents.

3) Whether the Court of Appeals erred in ruling that a cause of action under 42 U.SC. § 1983 based on lack of training requires a pleading of similar prior incidents.

LIST OF ALL PARTIES

Eugenia Rodriguez, Individually and as next friend and guardian of Alberto Torres and Alberto Torres, Petitioners

City of Brownsville, Respondent

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TABLE OF AUTHORITIES

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v.

[redacted]

CITY OF BROWNSVILLE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Eugenia Rodriguez, Individually and as Next Friend and Guardian of Alberto Torres, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-8a) is reported at 871 F.2d 552. Rehearing was denied on June 6, 1989 (App. B, *infra*, 9a-10a). The judgment of the Court was entered on May 1, 1989 (App. C, *infra*, 11a-12a). The opinion of the district court (App. D, *infra*, 13a-16a) is not reported.

JURISDICTION

The opinion of the court of appeals (App. A, *infra*, 1a-8a) was issued on May 1, 1989. A petition for rehearing was denied on June 6, 1989 (App. C, *infra*, 9a-10a). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution which provides in relevant part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

2. 42 U.S.C. Section 1983 which provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This case involves a police shooting in which Alberto Torres, a juvenile and Petitioner herein, was shot by Roberto Avitia, a police officer for the City of Brownsville, Texas. The District Court dismissed this case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (hereinafter "F.R.C.P.") on the ground that Plaintiff's Second Amended Complaint did not state a cause of action. (App. D, *infra*, 13a-16a) The entire factual portion of the Second Amended Complaint is set out in the Opinion of the Court of Appeals (App. A, *infra*, 1a-8a).

The facts alleged in the Second Amended Complaint are that Alberto Torres became distraught after an argument with his cousin. Alberto Torres created a disturbance and armed himself with a weapon. Several police officers from the City of Brownsville came to the scene and at various times tried to persuade Alberto Torres to throw down the weapon. Throughout the incident Alberto Torres did not place in jeopardy the life of any police officer or any other person.

Several of the officers at the scene had separate opportunities to apprehend, disarm or subdue Alberto Torres but none of these officers did so. The failure of the City of Brownsville to train these officers was the reason that they did fail to subdue or arrest Alberto prior to his shooting.

While discussions were continuing between Alberto Torres and the other officers, Officer Robert Avitia arrived at the scene. Without first checking with the other officers on the scene or his superiors, he shot and gravely wounded Alberto Torres. Roberto Avitia also had at his disposal other methods to attempt or subdue or arrest Alberto Torres without shooting him. Had these officers been properly trained, Alberto Torres would not have been shot.

The City of Brownsville failed to properly and adequately train its police officers to handle situations such as the situation described above. The training was grossly inadequate and the result of gross negligence on the part of policy making officials of the City. The City of Brownsville had delegated to the Police Chief complete authority over the training of police officers. The City had provided no guidance or instruction to the Police Chief who was left to develop all of these policies on his own. The Police Chief was a policy making official for the City of Brownsville. The grossly inadequate training of police officers in the City of Brownsville had existed for many years prior to the shooting of Alberto Torres and has continued through the date of judgment in the district court. Such failure to train amounted to a custom in practice which represented municipal policy.

The City of Brownsville, at all times before and after the shooting of Alberto Torres, employed officers whose only training was attendance at a local police academy. The officers, with this limited training, were placed on the street and expected to handle all types of emergency situations including dealing with armed suspects in highly charged, emotional circumstances. None of the officers had training in addition to their police academy training except for day light firearms training. The training provided at the police academy involving situations such as this was inadequate. At the time of the shooting of Alberto Torres and prior to that time there was training available to the Brownsville Police Department which, had the same been used, would have resulted in the officers properly handling the situation involving Alberto Torres without shooting him.

This action was brought under 42 U.S.C. § 1983. Jurisdiction in the District Court was founded on 28 U.S.C. § 1331 and § 1343.

REASONS FOR GRANTING THE PETITION

This is a police training case. The case was dismissed by the district court on the ground that the Petitioner's pleading did not allege more than a single incident of police misconduct. This was a misconstruction by the District Court of the "single incident rule" of *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). Since the dismissal of this case this court has done much to clarify the law with respect to police training cases in *City of Canton, Ohio v. Harris*, —— U.S. ——, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). This case should not have been dismissed for failure to state a cause of action for two reasons. First, facts pled stated cause of action under the rules announced in the *City of Canton, supra*. Second, the facts pled do not fall within the "single incident" rule of *Tuttle, supra*.

1. The facts of this case stated a cause of action for inadequate police training under the rules announced in the *City of Canton, supra*, because dealing with an armed and distraught individual is something that police officers in the field must be expected to face frequently, at least as frequently as fleeing felon situations. The City of Brownsville having armed its officers with firearms to allow them to do this job are required to provide training so that they can carry out the task consistently with the constitutional limitations on the use of deadly force. It is pled in this case that the City Police Chief is a policy-maker having been delegated all authority of the city government for police training, and that appropriate training was available and that the Police Chief elected not to utilize the same. It is submitted that this pleading of long standing voluntary failure to train amounts to deliberate indifference to the rights to persons with whom the City of Brownsville police officers come into contact. Thus, the City's conduct is actionable under *City of Canton, supra*, where it was held that:

> "We hold today that the inadequacy of police training may serve as a basis of § 1983 liability only

where the failure to train amounts to deliberate indifference to the rights to persons with whom police come into contact.

. . . .

The issue in a case like this one, however, is whether the training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent 'city policy'. It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the City can reasonable be said to have been deliberate indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible and for which the city may be held liable if it actually causes injury." *Id.* at S.Ct.1204-1205.

In a footnote to the just quoted text, the court states that:

"For example, the city policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), can be said to be 'so obvious', that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights.

It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless,

are 'deliberately indifferent' to the need." *Id.* at S.Ct. 1205.

City policy-makers know with a moral certainty not only that their officers will be required to arrest fleeing felons but that their officers will be required to deal with armed individuals who are emotionally distraught but who have not committed felonies.

2. The district court in its Memorandum and Order (App.D, infra, 13a-16a) and the Court of Appeals in its opinion (App.A, infra, 1a-8a) rely on the "single incident" rule to dismiss Petitioner's claims.

The "single incident" rule of *Tuttle, supra*, is not applicable to this case for two reasons. First, Petitioner's pled a long standing practice of inadequate training. They did not merely rely on the incident to prove the policy. Second, the facts alleged show that the incident in question did not involve a single untrained officer but involved a number of untrained officers. These officers made a series of mistakes and gave up a series of opportunities to control an emotionally distraught and armed person because they were inadequately trained to deal with such situations. This lack of training and this series of acts and ommissions was the moving force behind the shooting of Alberto Torres.

The "single incident" rule arises in relation to the question of what is necessary to establish city policy. In *Tuttle, supra*, this court held that a jury instruction which would have allowed the jury to infer that a police shooting was due to inadequate training was improper. The issue was improper because it would have permitted the jury to infer inadequate training based solely on the shooting incident itself. The District Court misconstrued *Tuttle, supra*, by concluding that city policy would be proved only by a series of prior incidents. This court did not so hold in *Tuttle, supra*. The same misconstruction of *Tuttle, supra*, is repeated by the Court of Appeals.

The facts pled by Petitioners, as are set forth in the opinion of the Court of Appeals (App.A, infra, 1a-8a) show that a policy of inadequate police training is shown by facts other than the shooting incident. First, Petitioners pled a long standing practice of inadequate training known to city policymakers. Second, Petitioners pled that the incident in question did not involve a single untrained officer but involved a number of untrained officers. These officers made a series of mistakes and gave up a series of opportunities to control Alberto Torres.

These facts clearly present two questions upon which this Court granted certiorari in *City of Springfield v. Kibbe* 480 U.S. 257, 107 S.Ct. 1114, 94 L.Ed.2d 392 (1987). There it was stated that:

> "We also granted certiorari on two other questions: whether the 'single incident' rule of *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed. 2d 791 (1985), is limited in application to one act by one officer, and whether a policy of inadequate training may be inferred from the conduct of several police officers during a single incident absent evidence of prior misconduct in the department or a conscious decision by policymakers." *Id.* at S.Ct. 1115.

Both *City of Canton*, *supra*, and *Tuttle*, *supra*, make it clear that the question is whether the inadequate training program is a "city policy". In *Tuttle*, *supra*, the court stated that:

> "But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation. Under the charge upheld by the Court of Appeals the jury could properly have imposed liability on the city based solely upon proof that it employed an non-policymaking officer who violated the Constitution." *Id.* at S.Ct. 2436-2437.

Siminarly in *City of Canton, supra*, the court held that:

> "Only where a deliberate failure to train reflects a 'deliberate' or 'conscious' choice by a municipality —a 'policy' as defined by our prior cases—can a city be held liable for such a failure under § 1983." *Id.* at S.Ct. 1205."

In the present case, the Brownsville city policy maker elected not to train when training was available to him. Thus, making a conscious and deliberate decision to adopt and accept inadequate training for his officers. This was a long standing practice both before and after the shooting incident in question. The "single incident" rule of *Tuttle, supra*, was in part based on the concern that the "single incident" might also be used to prove the causal relation between inadequate training and the constitutional violation alleged. This causal connection is established under the facts of the present case by the fact that a number of officers failed to act properly under the circumstances for the same reason, inadequate training.

3. District court dismissed this case under Rule 12(b)(6). Federal Rules of Civil Procedure (F.R.C.P.). In *Conley v. Gibson*, 355 U. S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) the court announced the rules for reviewing a dismissal under Rule 12(b)(6), F.R.C.P. and held that:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'."

The facts of this case as pled by Petitioners, as set forth in the opinion of the Court of Appeals (App. A, *infra*, 1a-8a), comply with the admonition of Rule 8, F.R.C.P. that the pleader provide a short, plain statement of the claim showing that the pleader is entitled to relief.

Petitioner having adequately pled its case, the case should not have been dismissed under Rule 12(b)(6), F.R.C.P.

CONCLUSION

This Petition should be granted in order to resolve the questions on which certiorari was granted in *Kibbe*, *supra*, regarding the contours of the "single incident" rule of *Tuttle*, *supra*. This Petition should also be granted because the facts of this case state a cause of action under the rules announced in *City of Canton*, *supra*, and the holding in that case should be declared to be applicable to such facts.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-2091

EUGENIA RODRIGUEZ, Individually, and as next friend of ALBERTO TORRES,
Plaintiff-Appellant,

v.

ROBERTO AVITA, *et al.*,
Defendants,

CITY OF BROWNSVILLE, TEXAS,
Defendant-Appellee.

May 1, 1989

Appeal from the United States District Court
for the Southern District of Texas

Michael E. Ezell, Harlingen, Tex., for plaintiff-appellant.

James E. Belton, Brownsville, Tex., for defendant-appellee.

Before GEE, HIGGINBOTHAM and DUHE, Circuit Judges.

GEE, Circuit Judge:

This appeal requires us to determine whether a civil rights action against a municipality arising from a shooting by a police officer was properly dismissed pursuant to 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim. The pleading that we must evaluate is not prolix, and we employ its own terms to state its claims:

> On or about August 29, 1980, Plaintiff's son, Alberto Torres, became involved in an argument with his counsin, Pablo Covarrubias. Soon after the argument began the Brownsville Police Department was called and a number of police officers arrived at the scene.
>
> Following the arrival of several officers of the Brownsville Police Department, efforts were being made by said police officers to persuade Alberto Torres to give himself up and to throw down a weapon which he had in his possession. Throughout this incident, Alberto Torres did not put in jeopardy the life of any police officer or other person.
>
> While the negotiations were continuing, Defendant Robert Avita, arrived at the scene, and without first checking with the other officers at the scene, or his immediate supervisor, shot and gravely wounded Alberto Torres in the chest and/or abdomen.
>
> Several of the officers on the scene had the opportunity to apprehend, disarm or subdue Alberto Torres prior to his being shot by Robert Avita. None of these officers did so. Robert Avita had available to him other means of attempting to arrest, subdue or disarm Alberto Torres which he did not utilize. The failure of the Brownsville police officers to properly subdue or arrest Alberto Torres or to control the situation was the result of a grossly inadequate training provided to such officers by the Brownsville

Police Department. Had such officers been properly trained, Alberto Torres would not have been shot.

The City of Brownsville is liable to Plaintiffs because the City of Brownsville failed to properly and adequately train its police officers to handle situations such as the situation described herein, and if such officers had been properly trained, Alberto Torres would not have been shot. The training provided to such officers was grossly inadequate and the result of gross negligence on the part of the policy-making officials of the City of Brownsville. In that regard, the Police Chief of the City of Brownsville had complete authority over training of police officers and the police. The City of Brownsville provided no guidance or instruction, in regard to the subject of police training and the police chief was left to develop all policies of the City of Brownsville in regard to this important matter.

The grossly inadequate failure to train the police officers of the City of Brownsville amounts to a policy regulation or decision of the City of Brownsville. The Police Chief of the City of Brownsville is an official to whom policy making authority has been delegated by the City Council through the City Manager. The grossly inadequate training provided to Brownsville police officers had existed for many years prior to the shooting of Alberto Torres and has continued to the present. The same amounts to a custom or practice which represents municipal policy of the City of Brownsville.

The City of Brownsville hired, at all times material before and after the shooting of Alberto Torres, police officers whose only training requirement was that they had attended the police academy which was inavailable [sic] at the time in the Rio Grande Valley. The officers with this limited training were put on the street and expected to handle emergen-

> cies of all kinds including dealing with armed suspects and controlling emotional situations in which weapons were exhibited or used. All of the officers involved in the shooting of Alberto Torres had attended the police academy. None had significant additional training in handling situations such as that involved in [sic] Alberto Torres except for daylight firearms training. The training provided by the police academy in handling these types of situations was at all times minimal in regard to the type of situations involved in [sic] Alberto Torres or any other emotionally charged situations in which an armed suspect was involved. At the time of the shooting of Alberto Torres and before there was training available to the Brownsville Police Department which, had the same been provided to the officers involved in the incident complained of, would have resulted [sic] these officers to have properly handled this incident without the shooting of Alberto Torres.

Analysis

Pleading Standards

Long before the filing of the pleading quoted above, it had been laid down as the law of our Circuit that in "cases invoking 42 U.S.C. § 1983 [1] we consistently require the claimant to state specific facts, not merely conclusory allegations." *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir.1985), and see authorities from this and other circuits cited at note 20. Cases such as *Elliott*, where the immunity to suit of governmental officials is at stake, present a special and acute subset of the general run. In view of the enormous expense involved today in litigation, however, of the heavy cost of responding to even a baseless legal action, and of Rule 11's new language requiring reasonable inquiry into the facts of the case by an attorney *before* he brings an action,

---

[1] Such as this.

applying the stated rule to all § 1983 actions has much to recommend it. There can be scant imposition, after all, in requiring a pleader who has already inquired into the facts of his case to plead his understanding of them, as our authorities cited have often suggested. We need not go so far in today's case, however, for reasons which we shall shortly explain. Before doing so, however, it is appropriate to consider what sort of claim Mrs. Rodriguez had to state in order to remain in court.

Municipal Liability

The law with which we must deal has been well-settled in general outline for some time. The Court decided in 1978 that a municipality could not be held vicariously liable in an action under § 1983: that such liability attaches only when the municipality *itself* has acted wrongly. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Where the city is sought to be held liable on the basis of actions by low-level employees such as those of Officer Avita in today's case, these must be shown to have been carried out in obedience to overall municipal custom or policy. *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983).

In *Languirand*, we also held, however, that there might be a cause of action against a city under § 1983 for injury resulting from the negligent act of a poorly-trained policeman, where the failure to train resulted from "gross negligence amounting to a conscious indifference" on the part of the municipality. *Id.* at 227. We cautioned, however, that to make such a showing in such a case, there would have to be demonstrated "at least a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or wide-spread throughout the police force." *Ibid.* So holding, we concluded that municipal liability could not, as a matter of law, be derived

from a single incident of improvident discharge of a firearm by a police officer, who had been seeking to halt a departing automobile by shooting out a tire and had instead struck a vehicle occupant when the pistol recoiled upwards before his second shot.

Two years after Judge Garwood's careful opinion for our Court in *Languirand* came *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), in which the Supreme Court held to like effect in a fact situation all but identical to that of *Languirand*. Although the Court was unable to agree on every aspect of the opinion's reasoning, seven judges of the Court agreed in general that a single shooting incident by a police officer was insufficient as a matter of law to establish the official policy requisite to municipal liability under § 1983. And, within weeks of today's writing, came *City of Canton v. Harris*, —— U.S. ——, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), citing *Tuttle* with approval and making plain that training police officers inadequately can only be viewed as city "policy" when it results from a deliberate and conscious indifference to the rights of persons with whom the police come into contact, resulting in an "identified deficiency in the city's training program . . . closely related to the ultimate injury" and which "actually caused" the plaintiff's injury. —— U.S. at ——, 109 S.Ct. at 1205.

The Law Applied

Bearing the foregoing statements of the law on municipal § 1983 liability in mind, it is apparent that Mrs. Rodriguez's complaint falls short of pleading such a cause of action against the city.[2] Her counsel candidly and commendably conceded at a hearing in connection with his motion to amend to claim inadequate training as a theory of recovery that his claim was "basically one officer

[2] The individual policeman was dismissed earlier as "uninsured and unnecessary."

and one situation, one incident" and that as to other incidents he had nothing to add. Thus the claim as pleaded comes down to this:

That while police officers were trying to persuade the plaintiff's teenage son to drop a rifle with which he had armed himself in the course of a dispute with his cousin, another officer arrived on the scene and, without communicating with the other officers, shot the young man. The failure of the officers to subdue the youth by gentler means was the result of inadequate training, which was, in turn, the result of gross negligence on the part of policy-making city officials. The police chief had no guidance about training policies from the city and developed all such policies himself. The grossly inadequate training had existed for many years and amounts to a municipal policy. Graduation from a local police academy was the only training requirement, and training there was "at all times minimal in regard to the type of situations involved in Alberto Torres [sic] or any other emotionally charged situations in which an armed suspect was involved."

Such a pleading does no more than describe a single incident of arguably excessive force applied by one officer —a description decked out with general claims of inadequate training and gross negligence, all concededly stemming from the single incident and nowhere else. It is clear from counsel's quoted colloquy with the trial judge that he has pled his case fully and has nothing to add, that the sole foundation for his general and conclusory allegations of "gross negligence" and "grossly inadequate training" was the pleaded incident itself. Under the rules of *Tuttle* and *Languirand* discussed above, there is no case —not as a matter of pleading, merely, but as one of conceded fact.

Counsel directs us to the dissent of four Justices in *Springfield v. Kibbe*, 480 U.S. 257, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987), but this has been mainly bypassed by *City of Canton*, cited above, insofar as it moots ques-

tions of municipal liability for inadequate police training and what standard should govern such liability. In addition, a footnote to the *Kibbe* majority opinion dismissing the writ as improvidently granted notes that on that appeal the Court had been prepared to consider whether the conduct of *several* police officers during a single incident might give rise to the inference of "a policy of inadequate training." 480 U.S. at 258 n.*, 107 S.Ct. at 1115 n.*. It did not do so, however, and we are not freed to depart from our Circuit's rule announced in *Languirand* by such a conditional observation.

The complaint was properly dismissed and the order of the trial court doing so is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2091

EUGENIA RODRIGUEZ, Individually and
as next friend of ALBERTO TORRES,
Plaintiff-Appellant,

versus

ROBERTO AVITA, *et al.*,
Defendants,

versus

CITY OF BROWNSVILLE, TEXAS,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING
(June 6, 1989)

Before GEE, HIGGINBOTHAM and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2091

D.C. Docket No. CA-B-82-198

EUGENIA RODRIGUEZ, Individually and
as next friend of ALBERTO TORRES,
Plaintiff-Appellant,

versus

ROBERTO AVITA, *et al.*,
Defendants,

CITY OF BROWNSVILLE, TEXAS,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before GEE, HIGGINBOTHAM and DUHE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

May 1, 1989

Issued as Mandate: June 10, 1989

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C. A. No. B-82-198

EUGENIA RODRIGUEZ, Individually and
as next Friend of ALBERTO TORRES

vs.

ROBERTO AVITIA, Individually and as Police Officer,
CITY OF BROWNSVILLE, TEXAS

MEMORANDUM AND ORDER

[Filed Dec. 28, 1987]

FACTS

This lawsuit arises out of an incident that occurred on August 29, 1980. Plaintiff's son, Alberto Torres, became involved in an argument with his nephew, Pablo Covarrubias. Several Brownsville Police officers were dispatched to the scene and when they arrived, Alberto Torres had in his possession a .22 caliber rifle. Negotiations between the police officers and Alberto Torres ensued and during those negotiations Alberto Torres was shot. The specific facts as to how the shooting occurred are, of course, still in dispute.

Plaintiff has filed an action under 42 U.S.C. § 1983 claiming that Police Officer Roberto Avitia used more force than was necessary to contain the situation and that the excessive force was a result of his inadequate training as a police officer. This theory of recovery was not initially pled but the Court has granted Plaintiff's Leave To Amend in favor of her Second Amended Com-

plaint which does contain such allegations. Additionally, the Court has dismissed the individual police officer, Robert Avitia, pursuant to Plaintiff's request. The remaining Defendant, City of Brownsville, has caused to be filed a Motion To Dismiss and, In the Alternative, Motion For Summary Judgment. The Court's resolution of Defendant's Motion follows:

Motion To Dismiss and, In The Alternative, Motion For Summary Judgment

The Defendant City of Brownsville contends that Plaintiff's cause of action, as it is pled, cannot sustain a cause of action under § 1983 for inadequate training of the City's police officers. Under the facts as have been pled by Plaintiff, the Court agrees.

A) *Inadequate Training*

The Fifth Circuit has clearly established the standard which governs imposition of municipal liability. A city can be liable only if the alleged wrongdoing is pursuant to some official policy. Official policy has been defined as:

1) A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipuality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

2) A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984).

Plaintiff alleges that the inadequate training of Defendant's police officers amounts to a policy regulation or decision by its policy-makers. However, Plaintiff asserts no specific facts which would support the bare assertion that the City of Brownsville authorized and approved the practice of its police officers using excessive force. Plaintiff's allegations with regard to a "policy" are clearly insufficient under *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985). *See also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436, 85 L.Ed. 2d 791 (1985) (plurality opinion). Therefore, Plaintiff's theory under a municipal "policy" must fail as alleged.

Plaintiff's only other cognizable theory in this case is to show a "custom" of inadequate police training through a persistent and widespread practice of police misconduct. This "custom" cannot be proven unless Plaintiff can allege other similar instances of police misconduct which were the result of inadequate training. Plaintiff has conceded that she has no evidence of any such instances.

In *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427, 2436 (1985), the Supreme Court concluded that proof of a single incident by a single officer is not sufficient to impose liability on a municipality. In this case, Plaintiff has pled that the alleged unconstitutional action occurred by a single officer, Robert Avitia, and in a single incident. Therefore, under *Tuttle*, Plaintiff's allegations must fail.[1] Similarly, in *Palmer v. City of San Antonio*, 810 F.2d 514, 516-517 (5th Cir. 1987), the Fifth Circuit has made clear that "the assertion of a single incident is not suffi-

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[1] Recently, in *City of Springfield, Mass. v. Kibbe*, 107 S.Ct. 1114, 1115 (1987), the Supreme Court refused to consider whether a policy of inadequate training may be inferred from the conduct of *several* police officers during a single incident absent a showing of prior misconduct or a conscious decision by policy-makers. Plaintiff does not plead that the alleged unconstitutional action in this case was caused by more than one officer.

cient to show that a policy or custom exists on the part of a municipality". *See also Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985). ("Isolated violations are not the persistent, often repeated, constant violations that constitute custom and policy.").

Accordingly, the Court concludes that Plaintiff states no facts in his complaint which show that the City of Brownsville had a well settled and widespread practice of using excessive force. Absent such allegations, Plaintiff cannot sustain an action against the City of Brownsville. Defendant's Motion to Dismiss is therefore GRANTED and this lawsuit in all respects is DISMISSED.

It is so ORDERED.

DONE at Brownsville, Texas this 28th day of December, 1987.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District Judge

No. 89-181

In The

Supreme Court of the United States

October Term, 1989

EUGENIA RODRIGUEZ, Individually and as Next Friend of Alberto Torres,

Petitioner,

v.

ROBERTO AVITIA, et al, CITY OF BROWNSVILLE, TEXAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the City of Brownsville, Texas, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Eugenia Rodriguez, Individually and as Next Friend of Alberto Torres, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on May 1, 1989.

STATEMENT OF THE CASE

This case is an action under 42 U.S.C. §1983 seeking to impose liability on the Respondent, a municipality, based on a custom of grossly inadequate police training. This action arises out of a single shooting incident that occurred on August 29, 1980 in which Petitioner's son, Alberto Torres, was wounded by a single shot fired by Brownsville Police Officer, Robert Avitia.

At a hearing held in the trial court at which leave was granted to Petitioner to file her Second Amended Complaint pleading grossly inadequate training as her new theory of recovery against Respondent city, the Petitioner conceded that the claim was "basically one officer and one situation, one incident," and that as to other incidents Petitioner had nothing to add. (Pet. A, 6a-7a and 13a-14a). The Petitioner had earlier dismissed Officer Avitia from this action as "uninsured and unnecessary." (Pet. A, 6a, N.2, and 14a)

The trial Court, in granting Respondent's Motion to Dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, first concluded that Petitioner's allegation in the Second Amended Complaint failed to sufficiently plead an officially adopted or promulgated municipal policy. (Pet. A, 14a-15a). Regarding the theory of showing a custom of inadequate training, through persistent and widespread practices of police misconduct, the Court concluded that Petitioner pled no such facts and that Petitioner had conceded that she had no evidence of similar incidents of police misconduct resulting from inadequate training in order to plead the same. (Pet. A, 15a-16a). On appeal, the Fifth Circuit Court of Appeals

considered the sole issue of whether Petitioner had adequately pled a custom or practice of grossly inadequate police training. The Court of Appeals held that the trial court properly dismissed the complaint and affirmed the trial court's order. (Pet. A, la-8a). In arriving at its opinion, the Court of Appeals applied *Monell v. Department of Social Services*, 463 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *City of Oklahoma v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.E.2d 791 (1985); and *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983) *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984). The lower court also cites and discusses *City of Springfield v. Kibbe*, 480 U.S. 257, 107 S.Ct. 1114, 94 L.E.2d 293 (1987) and *City of Canton, Ohio v. Harris*, ___ U.S. ___, 109 S.Ct. 1197, 103 L.E.2d 412 (1989) in response to Petitioner's theory for recovery as argued before said Court.

REASONS FOR DENYING THE WRIT

I.

OPPOSITION TO QUESTIONS PRESENTED FOR REVIEW

Petitioner attacks the Court of Appeals judgment first asserting that in deciding her case both the trial court and Court of Appeals misconstrued and misapplied the "single incident" rule established in *City of Oklahoma v. Tuttle, supra*. Second, Petitioner argues that a §1983 cause of action for deliberate indifference for failure to train police officers can now be carved out of Petitioner's Second Amended Complaint, which would allow the application of the rules announced in *City of Canton, Ohio v. Harris,*

supra, and which opinion allows a policy of inadequate police training to be referred from the conduct of several officers during a single incident absent evidence of prior acts or similar incidents of police misconduct. (Pet., [i] – questions presented)

It is important to stress at the outset that the §1983 claim upon which Petitioner has relied in the trial court and the Court of Appeals is a custom of grossly inadequate (grossly negligent) police training in handling and subduing armed and emotionally distraught individuals, such as the Petitioner's son. (Pet. A, 2a-7a).

The law regarding §1983 municipal liability applied and cited by the Court of Appeals begins with *Monell v. Department of Social Services, supra*. *Monell* held that a municipality cannot be held liable under §1983 on a respondent superior theory. Id. 436 U.S. at 691, 98 S.Ct. at 2036.

The Supreme Court further held that:

> " . . . a municipality may be sued for damages under §1983 when the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers' or is 'visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision making channels." Id. at 690-691, 98 S.Ct. at 2035-36.

Quoting from *Addickes v. S.H. Kress & Company*, 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613, 26 L.Ed.2d 142 (1970), the court went on to cite the following with approval.

> "Congress included customs and usages [in §1983] because of the persistent and widespread discriminatory practices of state officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." Id. at 691, 98 S.Ct. at 2035-2036.

In *Languirand v. Hayden, supra,* the Fifth Circuit addressed the issue of §1983 municipal liability for failure to train and established the following standard:

> " . . . [I]f there is a cause of action under Section 1983 for failure to properly train a police officer whose negligent or grossly negligent performance of duty has injured a citizen, that such failure to train must constitute gross negligence amounting to conscious indifference, and that a municipality is not liable under Section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force." Id. at 227-228.

In *City of Oklahoma v. Tuttle, supra,* the Court held that a single isolated incident of police misconduct is not sufficient to impose §1983 liability against a municipality under *Monell.*

The Court further expressed that:

> "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell,* unless proof of the incident includes proof that it was caused by an existing,

> unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." Id. 471 U.S. at 823-824, 105 S.Ct. at 2436.

The Court in *City of Springfield v. Kibbe, supra,* held that certiorari had been improvidently granted where the city failed to properly preserve for review the question whether inadequate training is a proper basis for municipal liability. However, in *City of Canton, Ohio v. Harris, supra,* the court concluded that there are limited circumstances in which an allegation of a failure to train can be the basis for liability under §1983 and held that deliberate indifference in failure to police officers is the standard of fault and causation in such cases.

In reviewing the trial court's order, the Court of appeals noted that the law applicable to this case had been well settled for some time. (Pet. A, 5a). Applying the statements of law on municipal §1983 liability established in *Monell, Tuttle, City of Canton* and *Languirand* to Petitioners pleadings and concessions, the Court of Appeals found that Petitioner's pleading fell short of pleading a cause of action against the City, and that such pleading described no more than a single incident of arguably excessive force applied by one officer. Petitioner had "no case – not as a matter of pleading, merely, but as one of conceded fact." (Pet. A, 6a-7a).

The lower Court also considered the dissent in *Kibbe* and the *City of Canton* opinion as argued by Petitioner in support of her §1983 grossly negligent theory. The court recognized that *City of Canton* mooted the question of municipal liability for inadequate training and the applicable standard, and that *Kibbe* did not announce any departure from the single incident rule where the conduct of several officers might be involved or the Fifth Circuit's rule in *Languirand*. (Pet. A., 7a-8a). The Court of Appeals concisely addressed the issue on appeal and did not, as Petitioner contends, misconstrue or misapply the "single incident" rule in affirming the trial court's order of dismissal pursuant to Rule 12(b)(6), F.R.C.P.

Before Petitioner filed her Second Amended Complaint, the Fifth Circuit had explored the contours of, analyzed, re-evaluated, reiterated with approval and expanded upon *Monell, Tuttle* and *Languirand* in a number of other decisions dealing with §1983 claims against municipalities for inadequate police and city employee training. See *Berry v. McLemore*, 670 F.2d 30 (5th Cir. 1982); *Bennett v. Slidell*, 735 F.2d 861 (5th Cir. 1984) per curiam modifying 728 F.2d 762 (1984) (en banc) *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985); *Webster v. City of Houston*, 735 F.2d 838 (5th Cir. 1984)(en banc), rev'd on other grounds, 739 F.2d 993 (5th Cir. 1984)(en banc); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) reh. denied 779 F.2d 1129 (1986) (en banc) *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987); and, *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987). However, since the general law applicable to this case had been well settled in *Monell, Tuttle* and *Languirand*, the Court of Appeals apparently deemed it

unnecessary to rely on any of the above cases in deciding this case.

The thrust of Petitioner's second argument, which is artfully and tactfully phrased, is that from a selective reading and conclusory interpretation of the Petitioner's allegations in the Second Amended Complaint a characterization of facts within the rules of *City of Canton* can be found from which a policy of inadequate police training sufficient to meet the requirements of *City of Canton* can be inferred absent evidence of prior or similar incidents of police misconduct.

In *City of Canton, supra,* the Court's holding is as follows:

> "We hold today that the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. 109 S.Ct. at 1204, 103 L.Ed.2d at 426.

Monell, and *Tuttle* are cited in *City of Canton* with approval, and the Court succinctly states that:

> "Only when a failure to train reflects a 'deliberate' or 'consciousness' choice by a municipality -- a 'policy' as defined by prior cases – can a City be liable for such a failure under §1983." Id. 103 L.Ed.2d at 427.

Further elaborating, the Court states that it will not suffice to impose §1983 liability against a city "by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible;" "that a particular officer may be unsatisfactorily trained . . . ;" nor "that an injury

or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury causing conduct." Id. 103 L.E.2d at 427-428. Petitioner's assertions for granting writ of certiorari herein are precisely the above what "the city could have done" arguments rejected by the Court. Id. 103 L.E.2d at 428-429.

Petitioner is, in effect, requesting that the Court ignore the teachings of *Monell* and *Tuttle;* ignore the Fifth Circuit's application of these teachings in *Languirand* and in the present case; ignore Petitioner's concession that this is a single incident/single officer situation; and ignore that the claim pled and argued below was a §1983 cause of action based on a custom of grossly inadequate (grossly negligent) police training in subduing and handling an armed and emotionally distraught individual, such as Petitioner's son. This is not justified, and purely and simply serves to demonstrate that Petitioner is the one misconstruing and refusing to recognize the law applicable to her case.

The Court of Appeals' refusal to grant Petitioner permission to proceed against the Respondent based on her Second Amended Complaint was proper, and correctly prevented Petitioner from seeking to impose §1983 liability against the Respondent based on a pleading that "would result in de facto respondent superior liability;" "engage the federal court in an endless exercise of second-guessing municipal employee-training programs"; and, "would implicate serious questions of federalism." See *City of Canton v. Harris, supra,* 103 L.Ed 2d at 428-429.

Petitioner has conceded that she has pled her case fully and has nothing to add to show a custom of grossly negligent police training, which is a lesser standard than the "deliberate indifference" standard of *City of Canton*. Consequently, the Court of Appeals properly affirmed the trial court dismissal of Petitioner's claim for failure to state a cause of action upon which relief may be granted without having to add that "it appeared beyond doubt that Petitioner had no set of facts to support her claim which would entitle her to relief." See *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *Palmer v. City of San Antonio, supra*, at 515. See also *Elliott v. Perez*, 751 F.2d 1472, 1479 and N.20 (5th Cir. 1985) (Holding that a §1983 plaintiff must state specific facts and not merely conclusory allegations)

The holding of the Court of Appeals is not in conflict with applicable decisions of this court and this case does not present an important federal question which has not been settled by this court. Rule 17, U.S. Sup. Ct. Rules.

II.

FAILURE TO PRESERVE QUESTIONS PRESENTED FOR REVIEW

Petitioner in her Second Amended Complaint and argument to the lower courts advanced only a §1983 theory based on gross negligence (grossly inadequate training).

In *Languirand*, supra at 227-228 the Fifth Circuit had held that "such failure to train must constitute gross negligence amounting to conscious indifference." After *Tuttle*, the Fifth Circuit in *Grandstaff, supra*, 767 F.2d at

170, also expressed its "doubt that a finding of 'gross negligence' in that inadequate training will always be the ticket to municipal liability." In *Kibbe*, the dissenting opinion of Justice O'Connor, joined by Chief Justice Rehnquist, Justice White and Justice Powell, announced that the dissenting justices were prepared to hold that in inadequate police training cases the standard that should be required is "reckless disregard or deliberate indifference," *Kibbe*, Id. 480 U.S. at 268-269, 107 S.Ct. at 1121. The "deliberate indifference" standard was then established in *City of Canton*. The Petitioner cannot truthfully deny having had notice that a "gross negligence" allegation was insufficient. Petitioner clearly and purposely decided to rely on a lesser standard of gross negligence in light of the other serious defects in her amended complaint that she would need to overcome in order to prevent dismissal of her suit. Now, having exhausted and failed on the claim as pled and argued in the lower courts, Petitioner for the first time contends that "deliberate indifference" is the standard by which her pleading should be judged in order to justify her attempt to carve out from her pleadings an inferred policy and cause of action under *City of Canton*. Petitioner thereby hopes to bypass the *Monell, Tuttle* and *Languirand* requirements for showing the existence of a custom as followed by the Court of Appeals in deciding her case. By her own tactics and objectives in the lower courts, the Petitioner failed to preserve the questions presented that she now desires this court to review. See *City of Canton, supra* at 103 L.Ed.2d at 423-424; *Kibbe, supra*, 480 U.S. at 258-260, 94 L.Ed.2d at 297-298 and *Tuttle, supra*, 471 U.S. at 815-816, 85 L.Ed.2d at 798-799 (discussing preservation of issues

and raising objections to questions presented no later than respondent's brief in opposition to petition for certiorari.) As previously argued above, Petitioner has thoroughly failed to even adequately plead a §1983 claim against Respondent under the lesser standard of gross negligence fashioned by her in the lower courts.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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